Chapter III

ACCOLADE/OBSURITY
OF EXISTING JUSTICE DELIVERY SYSTEM
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Critics of adversarial legal system, which we follow from last several decades, find it responsible for delays in justice delivery. The critics find enormous shortcomings in the system. The most favorite phrase of the critics of system is, "the system is alien and not suitable for India." It is necessary to examine criticism of the system, because after all it is the criticism, which is the acid test after going through which the quality of a thing-undergoing test shines up. The critics like S.L.Khana are of the view that the laws and system with Indian origin would have been suitable for India. Mr. Khana writes,

"Law Commission 1955 expressed its opinion against application of British statutes in view of the changed conditions and suggested that the provisions of the British statutes shall be replaced by the corresponding Indian law. As a result of this parliament passed the British Statutes (Application to India) Repeal Act 1960" ¹

The parliament however does not made any change in the application of adversarial system for dispensing justice. In this context it is necessary to examine ancient justice delivery system of India, comparison of different justice delivery

¹. A textbook of comparative Law 1st edi. P. 163
systems introduced by aggressors in India with adversarial system and the circumstances under which adversarial system was adopted in India. It will also be appropriate to find out what are the achievements of adversarial system, what are its shortcomings and what are its qualities.

The most ancient period of the ancient history of India is the period of lord Rama. History of Rama's rule consolidated by Maharshi Walmiki provides the instances as to how justice was done and how the king himself uses to follow justice. Tulsidas put before the world Ramayana making some changes as per contemporary needs of society under the name Ramacatiramanasa. During the said period kings use to decide punishments with the advise of learned man. It is not certain whether the wise man-advising kings use to refer any written Code. It however appears that the wise man used to give references of Code of conduct, which are said to be followed as precedents. It is necessary to quote here some instances. First instance is about advise of Bhibhisana to Ravana to decide punishment for Hanuman for trespassing in the boundaries of Lanka, Kingdom of Ravana. The concerning Para of Ramacharitamanasa is as under,

"Although Hanuman gave him exceedingly salutary advise, full of devotion, discretion, dispassion and wisdom, the most haughty Ravana laughed and said, "We have found a most wise Guru in this monkey".
(Turning towards Hanuman he continued) Death hangs over your head, 0 wretch; that is why you have started exhorting me, 0 vile monkey." Just the contrary is going to happen;" retorted Hanuman. "I clearly perceive that you are labouring under some mental illusion." Hearing these words of Hanuman Ravana got nettled. "Why not some of you quickly kill this fool?" As soon as the demons heard it, they rushed forward to kill him. That very moment came Vibhisana (Ravana's youngest brother) with his counselors. Bowing his head he made humble entreaty: "It is against all statecraft: an envoy must not be killed. He maybe punished in some other way, my master." All exclaimed to one another, "this is sound counsel, brother." Hearing this the ten-headed Ravana laughed and said, "All right, the monkey may be sent back mutilated." 1

This instance shows that wise man Bhibhishana advised on the basis of a code of conduct, which is followed as rule of law. This part also shows that Bhibhishana was respected to be a just man and hence his advice was found appropriate by the ministers of the kings and followed by the King.

The second instance is again about Bhibhisana to Rama and Laxmana when they sought cooperation from ocean and the ocean did not respond.

1. Sundarakanda verse 24 8th Edi. P.548
"Those man who worship anyone else, giving up such a (benign) Lord, are mere beasts without a tail and a pair of horns. Recognizing Bhibhisana as his own man the lord accepted him in his service; the amiability of his disposition gladdened the heart of all monkey hosts. Then the all wise, who dwells in the hearts of all, is manifest in all forms, though bereft of all and unconcerned, and who had appeared in human substance with a specific motive and as the exterminator of the demon race, spoke words strictly observing the rules of decorum," listen o Lord of the monkeys and O valiant sovereign of Lanka how are we to cross the deep ocean full of alligators, snakes and all varieties of fishes, most unfathomable and difficult to cross in every way?" Listen O lord of Raghus" replied the king of Lanka "although your arrow itself can dry up innumerable oceans, yet propriety demands that you should approach the ocean and request the deity presiding over it (to allow you a passage). "My lord the deity presiding over the ocean is an ancestor of yours, hence he will think over the question and suggests some means of crossing the ocean). The whole host of bears and monkeys will thus be able to cross the ocean without much ado."

Dispensing justice by a King is an aboriginal thinking. In

1. Sundarakanda verse 50 P.566)
ancient period it was the aspiration of every king that his Kingdom would resemble Rama's kingdom however it was not possible for any king to be as just as Rama was. Even some of the decisions taken by Rama are also subject of criticism. The act of Rama to kill Shambuka and his act of driving out his pregnant wife Sita only to protect his clean image are pointed out to be the most unjust decisions taken and implemented by him. Tulsidas, while rewriting Ramayana dropped these instances in his Ramacharitamanasa, which find place in Walmiki's Ramayana and thus glorified the just image of Rama. So the history shows that amalgamation of the power to rule and dispense justice lead to unjust decisions.

Period of Bhagwat Geeta was the period of changing values. Apt guidance is there in Bhagwat Geeta about the confusing questions of righteousness and duties of human beings. What is justice and how it should be dispensed is, however not described in Bhagwat Geeta. Chapter X verse 38 reads,

"I am the ruling power (punishment) in rulers; I am righteousness in those who seek victory. Of secrets I am silence and I am wisdom of the wise."!

This is the only verse in Bhagwat Geeta about justice delivery system. It also speaks that the power of punishment was supposed to be vested with the Ruler.

1. Bhagwat-Gita Chapter 10 Verse 38
Manusmriti provides some details as to how the justice dispensing system should work. Chapter 8 verses 7 to 35 deal with the procedural aspects of justice delivery system. It also provides that the king should dispense with the justice. In some circumstances provided in the text, the king can appoint a committee of 3 or 4 Brahmins. The justice was required to be dispensed in an assembly. The members of the assembly have to give truthful answer when questioned. This means a sort of jury was called upon to assist justice-dispensing committee.

There is also a reference about giving a chance to produce witnesses to both the parties. The head of the justice dispensing committee has to unearth the truth by properly appreciating evidence and making appropriate inquiry. In ancient India Manusmriti was supposed to be the best source of law. The Hindu kings dispensed justice by following the text of Manusmriti.

The inherent defect with the system provided in Manusmriti is vesting the powers to dispense justice in the king. The system also appears to be based on Caste bias. There is no clear indication as to how the jury and witnesses could assist the king to unearth the truth. The system thus does not have relevance in the democracy.
The condition of justice delivery in ancient Britain was similar to India. Lord Dennings speaks about it in following words, "----- The sword was symbol of the authority by which justice is done. No judgment of any court, no order of any judge is of any use unless it can be enforced; and to be enforced it must need and to have the authority of the State behind it. The sword of justice is the sword of the state. It is the symbol of authority which must be upheld."¹

In present age the role of the king is played by State. In a democracy a body of elected members represent State. The basic aspect of democracy is vesting of power with the people. On this aspect father of nation says, "When people come into possession of political power, the interference with the freedom of the people is reduced to minimum. In other words a nation that runs its affairs smoothly and effectively without much state interference is truly democratic. Where such condition is absent, the form of government is democratic in name."²

All the democratic countries follow a principle that state is the most vicious enemy of citizen's rights. Almost all countries carved out fundamental rights in their Constitution and made an arrangement that these rights should not be infringed by

1. The closing Chapter 1st ed. P.276
2. India of my dreams 1st Edi. P. 16
the State. For this purpose it is necessary to make available an independent body, which will protect rights of citizens from being taken away by State. In spite of such an arrangement prevailing in all democratic countries there is a growing fear that the State will usurp the rights of people. Lord Dennings express this fear,

"But whatever philosophy predominates, there is always danger to the ordinary man. It lies in the fact that all power is capable of nuisance or abuse. The great problem before the courts in the 20th century has been, in the age of increasing powers how the law is to cope with the abuse or misuse of it."\(^1\)

The scrutiny of ancient system for justice dispensing in India reveal that like in ancient India the work of dispensing justice cannot be left to State.

The Vedic Dogma to follow Manuismriti was followed in later part of ancient period of Indian history for centuries. However, the research about law and justice in ancient India also reveals dispersion of justice by the judges and Magistrates Harihar Prasad Dubey an imminent scholar wrote in his work,

"Hindu Scriptures are full of matters relating to law and administration of justice. Necessary qualifications for Judges and Magistrates and their duties, rules for lodging complaints and the examination of witnesses,

\(^1\) the Discipline of law 1st Edi. P 61
the requisites for propriety of evidence, the definition of offences and their punishments, and the rules of succession and inheritance are stated therein with as much accuracy, precision, and depth of judgment as are scarcely to be found in the scriptures of any other people of the world. The following short account will give an insight of the rules laid down in Shastras for the administration of justice"1

Research of the same author about the trial of Civil and Criminal cases by Court in ancient India reveals that the courts followed system of trial by ordeal, battle or fight. He writes about Criminal trial in ancient India.

"Ordinarily, the trial for crimes was by ordeal an institute for the distinguishing criterion of guilt and innocence. Fire or water was the usual resource upon these occasions and used to be prepared with religious ceremonials for that purpose. The modes of Ordeal were various, and according to the choice of the parties and the nature of the offence." 2

He also writes about the trial of dispute as to title of land,

"It was a method of trying the guilt of an accused person or a dispute as to the title to land or a debt, by setting the two opposing parties to fight each other,

1. A short history of the judicial system in India by Harish Prasad Dubey P.35
2. Ibid. P.36
the loser being punished, or falling in his claim, as the case might be. Infants and those over sixty years of age might employ champions, which right was later extended to all litigants in civil actions. In Wager of battle on a writ or right, the parties fought by their champions but on appeals they fought in their own proper persons, subject to the exception aforesaid. In case of a felony, the fight took place between the accuser, and the accused that had a right to trial by battle. The combatants were each armed with a leather shield and a cudgel and fought until one of them gave in.

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---It is true that in the relevant period Danes and Saxon also practiced similar procedure of trial and accorded barbaric punishment of mutilation." 1

Even if it is so one has to draw conclusion that in ancient India there was no well-groomed system of justice dispensation, which will have the potential to separate truth from falsity and concoction. In spite of appointments of Judges and Magistrates the justice was influenced by the nature, prosperity, behaviour and status of the king dispensing justice. In this way the justice was state oriented.

Placing reliance on text of Manusmriti it can be said that in ancient India Penal Code containing definition offences,

1. A short history of the judicial system of India by Harihar Prasad Dubey 1st Ed. P:37-38
Procedure Code containing procedure for the trial of Criminal cases and a Civil Code defining rights and obligations and procedure to settle the disputes about these rights was in existence, however there was no appropriate, independent and impartial system to dispense justice.

The advent of Moguls and their settlement in India brought in existence a new policy-administrating rule of king through the courts. Unified system for imposing revenue and collection of revenue was brought in existence by the moguls. The king delegated the powers of justice dispersion to the local zamindars, but he has to dispense justice through the system established by the King and according to the procedure laid down. Apart from that the power of justice dispensation was divested in several authorities. In the last phases of Mogul rule following Civil and Criminal Courts were in existence.

The Criminal Courts were,

"1. Sudder Cuchery - In this court were received all the land-rents and revenues of the province, all accounts related to them adjusted, all purchases and sales of land and property confirmed, all differences between landlord and tenant heard and determined and whence all orders respecting rents and revenues were issued.

2. Buxey Dustore (Bakshi Dastur) - This court superintended the conduct of all the forces, guards,
etc. employed for the protection of the province, the prevention of thefts and disturbances of the peace of the inhabitants.

3. Faujdari - The jurisdiction of this court was wholly confined to criminal matters and the judgment of capital offences.

4. Burrah Adaulat - This was a court of Meum and tuum for all demands above 50 rupees, and did not interfere in any claims under the amount of that sum.

5. Ameen Dustore - It was, in a great measure, a court subordinated to the Sudder Cutcherry, as all complaints were first made to the former and then referred to the latter. They related entirely to the business of the revenue.

6. Chhotah (Chhota) - Adalat. It took cognizance of all suits for debts not exceeding 50 rupees.

7. Bazee Zemin Dustore - It was a court for settling all differences relative to charity lands and other public supports.

8. Bazee Jamma Dustore - This court took cognizance of adulteries, abortions and other crimes, that more immediately concerned the peace and happiness of private families; grants for lands and public works were issued from this court.

9. Karidge Dustore - The landholder's accounts, when settled, were sent to this Court for payment." ¹
Following Civil Courts were in existence in the above said period in India,

1. The Nazim - who, as supreme Magistrate, presided personally at the trial of capital offences, and held court every Sunday;
2. The Dewan - who was supposed to decide cases relating to real estates or property in land, but who seldom exercised this jurisdiction in person;
3. The Darogha-Adalat-ul-Alia, or Deputy of the Nazim - in the Criminal Court, who took cognizance of quarrels, affrays and abuses, and also all matters of property except claims of land and inheritance;
4. The Darogha-I-Adalat Dewani, or Deputy of the Dewan - in the Civil Court, was the judge of property in land;
5. The Faujdar or Officer of Police and judge of all crimes not capital - The proofs of these last were taken before him and reported to the Nazim for his judgment and sentence upon them;
6. The Qazi - who decided claims of inheritance and succession;
7. The Muhtasib - who had cognizance of drunkenness, the vending of spirituous liquors and intoxicating drugs and the examination of false weights and measures;
8. The Mufti - who expounded the law for the Qazi. Who, if he agreed, decided accordingly? If he disagreed, a reference was made to the Nazim, who called an Ijlas consisting of the Qazi, Mufti, Mohtesib, Daroghai-i-Adalat and Moulvis to decide; whose judgments were final;
9. The Qunungos, or Registers of the lands - to whom cases connected with land were occasionally referred, for decision, by Nazim Dewan, or Daroga of the Dewani; and
10. Kotwal, or peace officer of the night - dependent on the Faujdari. ¹

Comparing the justice delivery system in different ages of Mogul rule Harihar Prasad Dubey writes,

"In Akbar’s time, judicial regulations were liberal and humane. Justice, on the whole, was fairly administered, all cruel personal punishments, as torture and mutilation, were prohibited and capital punishments were considerably restricted in his time. His enactments were of humanitarian tendency. He prohibited trials by ordeal. He suppressed the barbarous custom of condemning to slavery. And the reign of Shahjahan is considered the golden age of Mughal rule."²

After this golden age justice delivery during the mughal

¹ A short history of the judicial system of India by Harihar Prasad Dubey 1st E P.-43
² A short history of the judicial system of India by Harihar Prasad Dubey 1st E P.-49
empires Justice delivery system started to collapse. Muslim zamindars, kings and Nawabs ruling different parts of the country after the collapse of Mughal Empire started to impose barbaric punishments. Justice dispensation in the territories ruled by these kings was partial, cruel and harsh.

Maratha King Shivaji, who is known for his self-respect, dignity and just rule came forward with people oriented justice Delivery system. He established a judicial system of dispensing justice. BabaSaheb Purandare, famous historian exploring the life of Shivaji, expressing his research oriented conclusions about judicial system during the reign of Shivaji. spokeas under,

"I come across some Judgments in civil disputes by Jijabai, mother of Shivaji, who used to look after dispensation of justice in early years of swaraj(rule of Shivaji). At the end of the judgment it is mentioned that the party who is aggrieved by the judgment can ask for justice from the mouth of Citizens i.e. Jury or Panchas. Respect of the Judges was preserved as King himself use to bow before the Court. I also come across four judgments given by King Shivaji about the land assessment. It was decided by the King that the matter be referred to the four clever cultivators of four different villages. In this way a system of public participation in justice delivery was introduced by Shivaji." ¹

¹. Lecture of BabaSaheb Purandare at District Bar room Jalgaon on 7th March 2001 Daily Janshakti 8th March 2001
This system was similar to dispensing justice by Jury or Panchas. Babasaheb Purandare also found that the justice system during the period of Shivaji was giving much value to ordeals, which is aboriginal and unscientific as well as barbaric method of justice delivery, which cannot be relied upon as a proper method to dispensing justice. It also appears that the King has the last say in Justice delivery. In this way the Justice delivery system during the reign of Shivaji was having some inherent Lacunas, which the ancient Indian legal system had.

Rise of capitalism and British rule lead the foundation for modern Indian law. Capitalism needs a strong State, which would possess an unrestricted and expanded power to enact changes in the every aspects of the civil society.

Bit by bit the laws made by British assimilated the earlier divergent justice dispensing methods in India and the different rules followed by the prevalent justice dispensing machinery. It is very interesting to see how the Englishmen brought in force the British laws and their justice dispensing system in India even before establishing British rule in India. In order to have speedy justice, according to the law to which British nationals were familiar, the company brought in existence Charter of 1922-23. This charter authorized president of factories and other chief officers to punish for offences committed by company's servant.
Charter of 1668 empowered British to govern island of Bombay and inhabitants thereof and to impose pains, punishment and penalty on them. This charter has a human face. The British had also taken proper steps to publish and popularize laws by translating them into local dialect. Law provided freedom of religion not only to Roman Catholics but also to Indians.

Harihar Prasad Dubey states.

"Accordingly, in January 1670 arrived the laws enacted by the Company for the government of Bombay. They had their translation into Portuguese as well as into coastal dialect of Marathi.

The first Section of these Laws dealt with religious observances and granted freedom of religious belief not only to Roman Catholics but also to Indians. Fine or imprisonment might be inflicted for the use of abusive or contemptuous language about another person's religion. By section 3, provision was made for the establishment of a Court of Judicature for the decision of all Civil and Criminal cases by a judge to be appointed by the Governor and Council; trial was not English when half of the Jury was to be non-English. There was to be a right of appeal from this Court to the Governor or Deputy-Governor and Council, who were to be constituted the Supreme Court for the Port and Island. Justice of the peace and Constables were
also to be appointed for the maintenance of order and apprehension of criminals. Mutiny, sedition, insurrection or rebellion were to be punished by death; but trials were to be not by courts-martial but the Governor and Council, or by a Jury." 1

In 1671 two courts of judicature were established for the Island and town of Bombay. The charter of 1683 established Court of admiralty at Surat. Initially the British officers graced with judicial powers were bias and corrupt Mr. Dubey writes in his work,

"Indians suspected to be wizards were ordered to be seized and imprisoned. In 1710, an old woman and two men with their appurtenances bundled up in a cloth, consisting of a live cock, rice, butter, salt, flowers, etc. with a drum and two small brass musical instrument's were after being seized ('taken in the act' of wizardry), tied and severely beaten by a 'Sergeant going the rounds as usual ', thrown and confined for the whole night in the guard room 'in the greatest agony imaginable flinging and tearing like a fury', and were next morning 'whipped off the Island', on the charge that 'these Jogues (Jogis) as well as most of the Gentiles (Hindus) are much given to diabolical invocation;.

Many a Deputy-Governor 'obliged the people to

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1. A short history of the judicial system of India by Harihar Prasad Dubey 1st E.P.-12)
pay' him fees for hearing their complaints and disputes'-at which the Inhabitants were greatly grieved'. The Company itself wrote in 1715 to Boone, the Governor-designate of Bombay, that 'this is a crying mischief which must be speedily and effectively remedied. It is impossible any place can ever thrive where the people are not secured in their liberty and property.'

The Courts of judicature were re-organized in 1718. Courts came in existence in Madras and Calcutta. Soon the British founded a convenient and appropriate system of dispensing justice, which was also helpful to them for the proper Governance of an alien country.

So the well oriented research and historical facts show that adversarial legal system rooted its existence in the Indian soil almost since 17th century.

The adversarial system in quest for justice provides a long procedure. In this system the judge plays a passive role. He has to except the evidence led by the party, test the reliability of evidence, weigh the evidence and then finally give a verdict in favour of party adducing better evidence. This process compel the parties to adduce plethora of evidence, consume much time of the court in arguments and delay the proceedings even

1. A short history of the judicial system of India by Harihar Prasad Dubey 1st E P.- 20
waiting for a judge deciding the matter with a particular view which becomes favorable to one party and which may not coincide with a view taken by some other judge in that situation. In addition to this the adversarial system does not allow the decision of a court to be final unless it is legality tested at the upper step of the hierarchy. This aspect of the system keeps the cases pending for a long duration.

With all these inherent defects the system has several merits. Firstly the system gives equal opportunity to both the parties to present pleading, adduce evidence and argue before the court. The system emphasize on all the three great principles of natural justice, which are justice, equity and good conscious. The system provides protection and status even to the accused by protecting his rights and not supposing him guilty unless the offence is proved. Above all it is the adversarial system of law which provides the court's power of judicial activism. The precedent oriented system unifies interpretation of law in all the courts in India. The courts not only follow the law but also lay down the Apex Court after appropriately interpreting the statute according to the needs of society and changing values.

The present day criticism of adversarial system is about several aspects. Justice Krishna Iyer says,

"The adversarial trial system, a global heritage, is now
on critical trial, its disfunctionality as a procedural system for fulfillment or equal justice to les miserable is under impeachment, and its institutional debility as arrester of organized injustice and as catalyst of a just social order is coming under skeptical fire. A comprehensive critic of justicing technology going and is the brand name of Anglo-American legal process, offering a constructive alternative of judiciary fair deal, is an urgent and important project.¹

Arun Mishra President of Bar Council of India expressed his views,

‘Cases do not cross the admission stage for years together. Motion list is normally overburdened. Delay causes frustration and loss of confidence. Delay in execution denies effectively the fruits of decree/order/ writ or directions.’²

N. Vithal and Dr. S. Mahalingum thinks,

"The delays in legal system are well known. There are thirty million cases pending in various cases. The average time span for a dispute to be resolved through the court system is about 20 years. Litigation has become a convenient method for avoiding prompt retribution by many people on wrong side of law."³

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1. Conference paper of third International conference of Appellate judges p. 25
2. Address by Arun Mishra to the seminar on judicial reforms by Supreme Court advocate on record association publish in Indian bar preview Sep/Dec 1908 page 38
3. Fighting corruption and restructuring Government The symbiosis law time July/ Aug 2000 Page 1)
Chief justice V.B. Singh of Bombay High Court (as he then was) expressed his views by stating,

"And I am sure all of us here will accept this facts that there is something basically wrong with our system and that is why it has not been so successful."

The American jurists Delmar karlen also finds similar faults in the adversarial system in America. In his research oriented work he writes,

"We do not allow the winning party in a law suits to collect his reasonable attorney fees from loosing party, even if the losers claim or defence was wholly unfounded ---- we defend our practice on the ground that it keeps the court house door open so that any one may assert any legal right that he thinks he has, without fear of any serious penalty if it turns out to be without substance. The court house door are indeed kept open wide, but is that legitimate goal when the court house is already crowded to capacity?"

Scrutiny of the above criticism does not indicate that India needs to throw away adversarial system and adopt any other legal system. There is no option for India to switch over to ancient system, because the prevalent system of justice delivery to unearth truth and dispense justice. Presently in ancient India and medieval period is not suitable. The only

1. The symbiosis law time July/Aug 2000 page 10)  
2. Judicial administration: The American experience first addition page 63
suggested alternative is the inquisitorial legal system, which propounds active role of judges while dispensing justice. In India every institution including judiciary is under the shadow of allegation of corruption. Incoming Chief Justice Hon'ble Patnayak publicly pronounced,

"Institution of judiciary is under the eclipse by shadow of corruption."\(^1\)

In this situation active role of every judge will create more and more instances like the instance of G.W. Singh and others. Committee of reforms of Criminal Justice System Chaired by Dr. Justice Malimath is examining the possibility of adopting some good principles of inquisitorial system. Comparing both the systems he writes,

"There is a feeling that the existing Criminal Justice System exalts a criminal's right over the victims, procedure over the substance and adversarial supremacy over the quest for truth and justice. In the adversarial system followed in our country, the Judges function like umpires, and not seekers of truth. The burden on the prosecution is to prove the case beyond all reasonable doubt. Therefore it is the competent and efficiency of the investigating and prosecuting agencies that decide the outcome of the proceedings. In the inquisitorial system, followed in France and other countries, investigation is required

\(^1\) Lokmat sunday 10 November 2002 P.2 C.6 Line 1
to be done under the supervision of the Magistrate, whose duty is to guide and supervise the investigation, with the object of finding truth. The Magistrate plays a major role in presentation of evidence at trial.\textsuperscript{1}

No doubt minimal rate of conviction is because of inapt functioning of investing agencies. It is because of negligent or deliberate lacunas in investigation, which lead to acquittal in most of the cases. In such circumstance the supervision of a Magistrate will not yield any positive result, on the contrary bringing the police machinery handled by the political persons in contact with judiciary may create unwanted and unexpected problems for judiciary.

Justice Rajan Kocher of Bombay HC expressed his views about dangers in implementing the schemes for speedy disposal without analyzing the risk of jeopardizing the prestige of Judiciary. He is of the view that there should be a strict test at the entry level in Judiciary. As per him the integrity of a person cannot be tested by his written or oral examination. He shares his experience with the readers by writing that some advocates famous for their activities somehow get entry in Judiciary. He is of the view that appropriate persons who are of clean character should be found and appointed as Judges.\textsuperscript{2}

\textsuperscript{1}Questionnaire circulated by the committee for Reforms of Criminal justice System P.1
\textsuperscript{2}Loksatta 23rd January 2000 Lokrang P.1
Chief Justice V.B. Singh of Bombay HC has (he then was) also agrees with this criticism. He writes,

"Now it is different matter where you find a fault. Some find the fault in the procedure that we have. Some find the fault in the personnel we employ."

So in view of their Lordships presence of honest and clean persons have maintained the Just image of judiciary and this just image can be maintained by appointing proper persons. In other words man implementing the system and not the system is responsible for delays.

In this way no alternative is left for India than to proceed with adversarial system. It is also quite difficult to remove a deep rooted justice delivery system and adopt new one. There are ways and means to remove the shortcomings in the system. The delays and latches can be removed by streamlining the machinery law. Decreasing the number of appeals and limiting the avenues of appeals can reduce instances of appeal. The institution can be made responsible and attentive by removing black sheeps and disfunctional personalities occupying the chairs. Basically a man occupying the chair if he desires can make changes in the system with the aid of existing laws and rules. This happened in Indian judiciary earlier. Jurist S.N. Dyani writes,

" British legal system developed the principle that

1. Symbiosis Law times July/Aug. 2000 P.10
justice is blind or the Judges ought to live in ivory tower meaning thereby that they are required to interpret law logically & statistically unmindful and unconcerned of social consequence or effects of this judgment on society. The Indian judges like M.C.Chagla, P.C.Gajendragadadkar, Krishna Ayer, P.N.Bhagwati, D.A.Desai, Chinappa Reddy have rejected this Anglo-Saxon jurisprudence."

Here again it is emphasized that a person, his disposition, integrity and devotion makes a difference. If we find the people with caliber, even with this system we can fulfill the hopes of people at large.

One of the famous jurists, who changed the path of Indian judiciary, came to conclusion that the fault does not lie with the system but with the treatment provided to the judiciary by the State. He observes,

"The jeopardy to the court system comes from legislative indifference and executive neglect. The constitution has made the triple facets of justice the corner stone of the edifice of state. And yet the court has been let down by the both the other wings. In the national plan the justice system is not an item. Courts where people have litigative needs are out side the plans and therefore suffer financially. It is humiliating

1. Fundamental of jurisprudence page 24
how backward the administrative and other circumstance of the Court is. An independent judiciary under such adversity can be casualty and their "robed martyrs" have remarkable survival value, defiant or indignity."  

This is not only the problem of India. In America too there is a feeling that the judiciary is a neglected sector. Denis Sazbo of University of Montreal writes,

'Let's now compare the courts, and sometimes even police services, with their predecessors of a hundred year ago. In most cases, there is little difference. The world has changed, but Justice has not. It has regressed in fact.'

Though the justice delivery system is a neglected institution for the State and the society, most abuse of this institution is done by the State and society. Honourable Justice Bharucha (as he then was) during the felicitation address of All India Seminar by Supreme Court's Advocates on Record Association spoken about the approach of the state to dump litigations in the court. He speaks,

"It has been my experience in the High Court at Bombay and Bangalore and in the Supreme Court that every matter that the state and central government loose is brought in appeal to the High Court and

2. Criminology and Crime Policy P.161
thereafter to Supreme Court. It would appear that there are few government officers willing to say enough to enough. Most would rather say that the matter should be carried higher. It could be then be said, we did all we could but even the Supreme Court did not see it right. So large percentage of work is generated by State and Central Government. In this manner the pendency in Supreme Court and High Court would be substantially reduced if litigation of this nature was, as it easily could be, avoided."

Delmar Karlen in this regard expresses the American experience. He says,

"Another partial explanation of the congestion in American courts is that they are dumping ground on unresolved social problem like homosexuality, alcoholism, narcotics addiction and vagrancy. Not knowing what to do with the offender (who happen also to be the victims) we haul them in the court, sentence them to jail for a while and then sent them away uncured. Usually nothing has been accomplished expect to clog court calendars."  

In this way it is not the system to be solely blamed for the inordinate delay and pendency. There are several others factors responsible for delays. Even some organs of judiciary

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contribute to the delays. When the organ, which has to appropriately run the system itself, paralyses system then it is futile to blame the system.

The problem of the adversarial system raised by the critics is not the incurable decease to discard the system. Remedy to this problem could be found and the system can perfectly cured. Firstly it is wrong to say that the adversarial system is disfunctional. The system is definitely functional. The system is dynamic and therefore the system responded positively to the experiments carried on it by the Indian Judges. The only problem is that appropriate efforts are not made to diagnose the area of malfunctioning of the system. It is also improper to say it is only because of adversarial system that the cases do not cross admission stage for years together. The delays at this stage can be curbed by amending the procedure, making the advocates professional, creating congenial atmosphere between lawyers and judges and spreading awareness in the society resolve the disputes as far as possible by negotiations so that the dispute inviting complicated legal problems should only come to the court of law.

Delay in execution of the decrees is basically caused because of lengthy procedure laid down in the Code of Civil Procedure. There is a loud talk of corruption amongst the machinery carrying out execution of the decrees. Judges dealing with execution carry it out as a thankless job. The High
as Ad-hoc judges and get the pending cases disposed off. In this way there are ways and means to reduce pendency without taking divorce from the adversarial system.

The average time required to resolve the dispute by the court system can effectively be reduced by streamlining procedure, by appointing proper men as judges and creating an atmosphere of trust and belief amongst them. This will encourage the Judges to work efficiently and effectively. First National Judicial Pay Commission recommended increasing number of Judges from 13 per million to 50 per million. The Central Government has taken a positive step to survey for financial implication for increasing the number of judges. Considering the finance required to construct new court building, appoint court staff, construct accommodation for Judges and staffs and make the arrangements for regularly paying salaries will require a huge amount. However keeping society under rule of law always require a huge cost. Creating a law-abiding society compensates this cost. Such society prospers and develops into a role model for the developing and the underdeveloped countries.

Imposition of heavy cost of the loosing party is also one of the steps to curb delays by creating deterrent effect to the entry of pseudo claims in the courts. We have to keep the doors of the court open for everybody. In our country where 40 per cent people live below poverty line (BPL) we cannot compel the
litigants to pay the court fees while instituting the suits. Still we are changing exorbitant Court fees as a precondition to institute the suits, which amount to deny entry to the poor to the temple of justice. We cannot resists the entry of litigation by charging heavy entrance fees in the form of court fees but we can create deterrent effect on the prospective litigants interested to file suits with only motive to take disadvantage of the justice delivery system by filing fake suits by imposing heavy penalties while dismissing such suits, This practice, if universally followed by all the courts; in long terms, will certainly reduce pendency.

The criticism of the system that there is something basically wrong with the system because of which we are not successful to deliver quick justice is criticism for the sake of criticism. Let us first diagnose what is wrong with justice delivery system. Then only we can confidently say that the system and system alone is responsible for the delays.

The corruption in the system is not because of the lacunas of the adversarial system but because of the men selected to implement system. It is well established that a corrupt man will create a way for corruption in any sort of strict circumstances, where as a non-corrupt man will remain clean even if he has working with lot of corrupt employees. In order to tackle the problem of corruption it is not necessary to change
the system but it is necessary to identify, isolate and throw away the black sheeps from the institution implementing system. In this way the shortcomings of the system pointed out by the critics can be removed by taking appropriate measures and remedies.

It is true that in ancient period the kings who were having impartial and respectable justice delivery system ruled India. It is however unfortunate that the ancient Indian legal system was not consistently in application. So the system was not tested on the anvil of time. Neither the system adopted advance techniques to dispense justice nor it shaded its unwanted features. Since medieval period India was attacked and ruled by aliens. Except the period of mogul Emperor Akbar India had never seen an impartial and respected judicial system. Ancient literature like Manusmriti describes rights, liabilities and offences as a breach of particular liability, however the system adopted in Manusmriti is state oriented system. It is therefore not possible for India to switch over or adopt few principles of the ancient justice delivery system.

Adversarial system has its roots deeply buried in the Indian social system. It has being applied and practiced in India from almost three centuries. It has adopted advance techniques and converted itself into a modern system with all advantages of global heritage. It recognizes the principles of justice equity and good conscious.
The shortcomings in the adversarial system responsible for delay and pendency could be resolved by applying appropriate remedies. In this way India has to go along with the adversarial legal system.